IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, et al., Plaintiff, v. TYSON FOODS, INC., et al., Defendants.	Case No. 4:05-CV-329-TCK-SAJ

TYSON CHICKEN, INC.'S OBJECTION TO AND MOTION TO QUASH PLAINTIFF'S SUBPOENA FOR INSPECTION AND SAMPLING OF PREMISES

Separate Defendant Tyson Chicken, Inc. ("Tyson") submits the following as its Objection to and Motion to Quash Plaintiff's Subpoena for Inspection and Sampling of Premises[1]:

I. INTRODUCTION

On April 18, 2006, Plaintiff issued a subpoena pursuant to Federal Rule of Civil Procedure 45(a) requesting the inspection and sampling of certain real property and poultry farming operations located in Adair County, Oklahoma.[2] The Rule 45 subpoena at issue is directed to Hudson Farms, Inc. However, through a merger and series of name changes, Tyson is the current owner of the Subject Property.[3] Tyson leases the Subject Property to Steve Butler d/b/a Green Country Farms (hereinafter referred to as "Green Country Farms"). Green Country

[1]This Motion was also filed in the Eastern District of Oklahoma federal court as required by FED. R. CIV. P. 45(c)(2). A copy of the subpoena is attached hereto as Exhibit "1."

[2] The property at issue is more specifically described in a legal description contained within a deed attached as an exhibit to the subpoena. This property is referred to hereinafter as the "Subject Property."

[3] The Subject Property was deeded to Hudson Farms, Inc. by Danny and Arlene Smith in 1985. Hudson Farms, Inc. merged into Hudson Foods, Inc. in 1995. In 1998, Hudson Foods, Inc. merged with HFI Acquisition Sub, Inc., with HFI Acquisition Sub, Inc. being the surviving corporation. In 1998, HFI Acquisition Sub, Inc. changed its name to Hudson Foods, Inc. In 2000, Hudson Foods, Inc. changed its name to Tyson Chicken, Inc. Thus, Tyson Chicken, Inc. is now the owner of the Subject Property.

Farms operates several poultry farms on the Subject Property. Pursuant to a contract with Green Country Farms, Tyson places poultry on the Subject Property with said poultry being fed and cared for by Green Country Farms.

Tyson objects to Plaintiff's request for an inspection and sampling of the Subject Property and further moves the Court for an order quashing the subpoena. Plaintiff's subpoena lacks the particularity required by the Federal Rules of Civil Procedure regarding the time, place, and manner of inspection. Moreover, Plaintiff's request to conduct sampling on the Subject Property is an unfounded "fishing expedition" that will impose significant and undue burden upon Tyson.

II. ARGUMENT AND LEGAL AUTHORITY

A. Applicable Rules of Civil Procedure

While litigants are entitled to conduct reasonable and necessary discovery making full use of the various discovery devices afforded them under the Federal Rules of Civil Procedure, the right to conduct discovery is subject to certain limitations. As a general matter, litigants are not entitled to use discovery devices to annoy, harass or oppress a party or to impose upon a party the undue expense and inconvenience of responding to frivolous discovery requests. FED. R. CIV. P. 26(c). In this regard, the federal courts have inherent discretion to deny discovery when it is apparent that the party seeking the discovery has no good faith basis to support the discovery request and is instead involved in a "fishing expedition." *See, e.g., Koch v. Koch Indust., Inc.*, 203 F.3d 1202, 1238 (10th Cir. 2000) ("Plaintiffs' mere hope that they might find something on which to base a claim . . . . [constituted] a fishing expedition" which the trial court had the inherent power to deny.)

In addition to the trial court's inherent powers to limit fishing expeditions disguised as discovery requests, there are several specific provisions of the Federal Rules of Civil Procedure

which are directly implicated by the Plaintiff's subpoena. For example, Federal Rule of Civil Procedure 45(c)(1) requires that "[a] party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." FED. R. CIV. P. 45(c)(1). If a party receiving a subpoena for the inspection of property serves a written objection within 14 days after service, then the inspection shall not occur "except pursuant to an order of the court. . . . ." FED. R. CIV. P. 45(2)(B). Rule 45(c)(3)(A) further provides that "[o]n timely motion, the court by which a subpoena was issued **shall** quash or modify the subpoena if it . . . subjects a person to undue burden." FED. R. CIV. P. 45(c)(3)(A)(iv) (emphasis added).

This Court's decision on the present motion also requires consultation of Rule 34's provisions relating to the inspection of property. It is well-settled that "the scope of discovery under a subpoena is the same as the scope of discovery under Rules 26(b) and 34." *Goodyear Tire v. Kirk's Tire, Inc.*, 211 F.R.D. 658, 662 (Kan. 2003) (citing Advisory Committee Note to the 1970 Amendment of Rule 45(d)(1) and 9A Wright & Miller, *Federal Practice and Procedure*, § 2459 (2d ed. 1995)); *see also In re Cusumano*, 162 F.3d 708, 714 (1st Cir. 1998) (relying on 9A Wright & Miller, *Federal Practice and Procedure*, § 2452 (2d ed. 1992)). Thus, Federal Rule of Civil Procedure 34 and cases interpreting that rule are persuasive in this Court's determination of whether to quash Plaintiff's subpoena.

Federal Rule of Civil Procedure 34(a) "permit[s] entry upon designated land or other property . . . for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)." FED. R. CIV. P. 34(a). A Rule 34 request must describe each item to be inspected with "reasonable particularity" and must "specify a reasonable time, place and manner of making the inspection." FED. R. CIV. P. 34(b).

B. Undue Burden Standard

"The right of a party . . . to inspect and test, like all discovery, is not unlimited." *Micro Chemical, Inc. v. Lextron, Inc.*, 193 F.R.D. 667, 669 (D.Colo. 2000). "[S]ince entry upon a party's premises may entail greater burdens and risks than mere production of documents, a greater inquiry into the necessity for inspection would seem warranted." *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904, 908 (4th Cir. 1978). "[A]ny such invasion of property rights must, in the language of the Supreme Court, 'be judged with care . . .'" *Id.* at 908, n. 12 (citing Wright & Miller, *Federal Practice and Procedure*, § 2040, at 286-187 (1970)).

Federal Rule 26(b)(2) provides that the Court may deny or limit discovery if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." FED. R. CIV. P. 26(b)(2). "The determination of issues of burden and reasonableness is committed to the sound discretion of the trial court." *Concord Boat Corporation v. Brunswick Corporation*, 169 F.R.D. 44, 49 (citing *Semtek Int'l, Inc. v. Merkuriy Ltd.*, 1996 WL 238538 at *3; 9A Wright & Miller, Federal Practice and Procedure, § 2463); *see also Jones v. Hirschfeld*, 219 F.R.D. 71, 74 (S.D.N.Y. 2003).

In the context of Rule 45 subpoenas, the federal courts generally apply a balancing test in determining whether the subpoena at issue imposes an undue burden. "Whether a burdensome subpoena is reasonable 'must be determined according to the facts of the case." *WIWA v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 815 (5th Cir. 2004); *see also Belcher,* 588 F.2d at 908 ("the degree to which the proposed inspection will aid in the search for truth must be balanced against the burdens and dangers created by the inspection."). This requires that the Court consider the following factors:

(1) the relevance of the information requested;

(2) the need of the party for the information;

(3) the breadth of the discovery request;

(4) the time period covered by the request;

(5) the particularity or specificity of the discovery request; and

(6) the burden imposed.

Id. at 907; *see also American Elec. Power Co., Inc. v. U.S.*, 191 F.R.D. 132 (S.D. Ohio 1999); *Goodyear Tire v. Kirk's Tire, Inc.*, 211 F.R.D. 658, 663 (Kan. 2003) (stating that the "Tenth Circuit appears to recognize the balancing test for quashing a subpoena based upon undue burden."). A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad. *WIWA*, 392 F.3d at 815.

An even more stringent analysis is required when the sampling or testing results in an alteration of property. Rule 45 permits only "inspection of premises;" it does not contemplate that a person who issues and serves a subpoena will be able to modify the property in order to conduct discovery. In *Micro Chemical v. Lextron, Inc.*, the issue before the court was "whether [during testing] Micro Chemical may alter Lextron's machine by substituting parts supplied by Micro in place of standard parts provided in the ordinary manufacture of the machine." *Id.* The court denied Micro Chemical's request, stating that "Micro Chemical has offered no evidence, by affidavit or otherwise, that the alterations create no risk of damage or easily can be accomplished." *Id.* Similarly, in *State ex rel. Crawford v. Moody*, 477 S.W.2d 438, 440 (Mo.App. 1972), the appellate court reversed an order of the trial court requiring that defendants "either *remove, produce and deliver* to plaintiffs, or allow plaintiffs *to remove and take possession* of" an underground gas pipe involved in an explosion where removing the pipe would result in material disruption in the condition of a piece of real property.

C. Plaintiff's Request to Inspect and Sample the Subject Property is an Unfounded Fishing Expedition Which Imposes an Undue Burden on Tyson.

Plaintiff has not satisfied the heightened standard of inquiry to which a request implicating property rights should be subjected. Plaintiff has not demonstrated the necessity of the information they seek to obtain from their sampling, nor has Plaintiff shown any consideration for the property rights of Tyson or its lessee. Because the burden upon Tyson is substantial and the benefits, if any, of Plaintiff's proposed sampling are either non-existent or trivial, this Court should quash the subpoena.

As a preliminary matter it should be noted that Plaintiff's proposed inspection and sampling of the Subject Property presents a series of litigation-related events which Tyson, its experts and its attorneys will need to witness, monitor and document. Because the entire point of this exercise by Plaintiff is to develop evidence that it will later attempt to use to establish liability on the part of Tyson in this case, Tyson must have its attorneys and experts present at each and every inspection and sampling event that Plaintiff conducts on the Subject Property. Tyson's oversight and monitoring of these events will, of course, require the expenditure by Tyson of significant fees and costs associated with the involvement of its attorneys and experts.

Litigation expenses are, however, the least of the burdens imposed by Plaintiff's subpoena. Plaintiff's proposed sampling also unduly burdens Tyson's property interests by presenting serious risks of injury to the land, potential interference with the use of the land and the potential for adverse effects on the health of Tyson's flocks. According to the subpoena, Plaintiff intends to enter the poultry houses where Tyson's flock is present. Plaintiff also intends to take as many as 240 soil samples from various fields on the Subject Property. Additionally, Plaintiff intends to install groundwater monitoring wells "to allow repeated sampling of the groundwater." To stabilize these wells, Plaintiff intends to install "a small concrete pad . . .

around and over the pipe." Plaintiff has also sought to reserve the right, if necessary, to bring an "auger drilling rig" onto the property to bore holes in the property in order to obtain groundwater samples. These sampling methods could cause substantial inconvenience to Tyson's and/or the lessee's use of the Subject Property and undoubtedly will have permanent effects on the condition of the Subject Property.

More importantly, Plaintiff has not agreed to follow appropriate biosecurity protocols during its proposed inspection and sampling of the Subject Property. Biosecurity protocols are of the utmost importance to Tyson. Access to the Subject Property without following proper biosecurity protocols, particularly by a person who has recently been on other poultry farms, presents a very real risk of the transmission of bird diseases which could seriously harm the health of the Tyson's then-present or future-placed flocks. Matters of biosecurity are critical and must be addressed given the much discussed risks presented by diseases such as Avian Influenza (AI), Infectious Laryngotracheitis (LT) and Exotic Newcastle Disease (END). Furthermore, a bird disease outbreak on any of these farms could result in the condemnation of any infected flocks thus resulting in significant monetary damages to the Poultry Defendants.

Tyson and the other poultry company defendants have made several good faith attempts to address their biosecurity concerns through conversations and written communications with Plaintiff.[4] Although Plaintiff has expressed a willingness to implement certain biosecurity protocols which it believes should be adequate to protect against a bird disease outbreak, it has thus far refused to adhere to all of the biosecurity measures required under Tyson's standing biosecurity policies. One example is Plaintiff's refusal to incorporate the 72 hour waiting period currently applicable to farms under contract with Tyson. Because farms in the IRW are

[4] The written communications between the parties on these subjects are attached hereto as Collective Exhibit 2. Counsel for Plaintiff and counsel for the poultry company defendants also held a meeting in Tulsa on April 26, 2006 to discuss biosecurity issues and protocols.

currently under a LT warning, Tyson's biosecurity policies prohibit the entry of farms under contract with Tyson by persons who have been on any other poultry farm within the previous 72 hours. (A true and correct copy of Tyson's written biosecurity policy is attached hereto as Collective Exhibit 3.)[5] Plaintiff's proposed biosecurity protocols do not incorporate this 72 hour rule and instead seek to limit the waiting period between farm visits to 48 hours. (*See* Ex. 2, May 2, 2006 Correspondence from Mr. Bullock to Mr. McDaniel.) Plaintiff's proposal presents undue and unacceptable risks of a bird disease outbreak.

The "undue" nature of the risks and burdens presented by Plaintiff's subpoena are even more apparent once those burdens are balanced against the non-existent or negligible "benefits" of Plaintiff's proposed inspection and sampling of the Subject Property. It is now clear that Plaintiff's subpoena is an unfounded fishing expedition embarked upon by Plaintiff without any good faith basis to believe that the inspection and sampling of the Subject Property will produce information relevant to Plaintiff's claims. The subpoena is based upon the unfounded assumption that "waste" (presumably a reference by Plaintiff to poultry litter) has been applied on the Subject Property. Plaintiff apparently bases this belief on the mere fact that poultry farming has occurred on the Subject Property. Of course, the mere presence of a poultry farm on a parcel of land does not mean that the parcel has also been fertilized with poultry litter. Some poultry farmers also raise cattle, hay or other crops and, therefore, benefit from the use of poultry litter to fertilize the pastures on their farms while other poultry farmers have no such fertilization needs for their property and, therefore, sell or give away poultry litter to third parties.

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[5] The LT warning in the IRW triggers the "Yellow Stage" protocols described in the Tyson and Cobb-Vantress biosecurity protocols. *See* Ex. 3. Plaintiff's recent offer to try to schedule sampling for time periods immediately after flocks are removed from these farms for slaughter, while gracious, does not remedy the Poultry Defendant's biosecurity concerns. LT, the disease of most concern at present, does not require physical contract with poultry for transmission. LT can also be transferred through contact with manure, feather and bedding if those items are contacted by a person in one poultry house and then inadvertently tracked into a subsequent poultry house.

Plaintiff was (or at least should have been) aware of the differing circumstances of poultry farmers with respect to the use of poultry litter before issuing the subpoena. In fact, this very issue was raised during the hearing conducted in the underlying action on March 23, 2006 when Magistrate Judge Sam Joyner inquired of Plaintiff's counsel as to how they planned to identify those fields which had actually received litter for the purpose of their proposed sampling. (*See* Ex. 4, Transcript of March 23, 2006 Hearing, p. 44.) In response, Plaintiff's counsel acknowledged their lack of specific knowledge at that time with respect to such matters but represented to the court that they could verify such facts (presumably before issuing subpoenas) either through visual observations or through communications with the defendants to this lawsuit. *Id.*[6]

It does not appear that Plaintiff has verified any history of actual litter applications with respect to the Subject Property. Certainly, Plaintiff has not asked Tyson about the history of litter applications on the Subject Property. Instead, Plaintiff has simply assumed that litter applications have occurred on the Subject Property and have arrogantly issued a subpoena demanding that they be taken to the "waste applied fields" on this parcel so they can take soil, run off and groundwater samples from such sites. As it turns out, no litter has been applied on the Subject Property for at least the last seventeen (17) years. *See* Ex. 5, Affidavit of Danny Partain at ¶¶ 4, 5. As is the case with many poultry farms, the litter generated from this farm has historically been given or sold to third parties. *Id.* at ¶5. Thus, Plaintiff's request to take soil samples, run-off samples, and groundwater samples from "waste applied fields" is futile with respect to the Subject Property. There simply are no fields on the Subject Property to which

[6] To the extent that Plaintiff intends to identify poultry litter application areas through on-site interrogations of the managers or employees of the lessee, Green Country Farms, such a practice is clearly not permitted pursuant to a Rule 34 or Rule 45 inspection. *See Belcher*, 558 F.2d at 908 (reversing lower court's order permitting interrogation of plant employees by plaintiff's expert during Rule 34 inspection.)

litter has been applied; at least not in recent years. Consequently, the requested samples cannot be taken.

In light of the foregoing, this Court should find that Plaintiff's subpoena presents an undue burden to Tyson. The burdens of having to monitor (both with attorneys and experts) the extensive and continuing sampling of property where litter has not even been applied and the risk of injury to the real and personal property interests of Tyson clearly outweigh the benefits, if any, to the Plaintiff from the proposed inspection and sampling. Consequently, the Court should quash Plaintiff's subpoena.

D. Plaintiff's Subpoena Does Not Meet the Specificity Requirements of Rules 34 and 45.

The undue burden upon Tyson is exacerbated by Plaintiff's failure to abide by the time, place and manner specificity requirements of Rules 34 and 45 and the continuing nature of the subpoena. Rule 45 states that "[e]very subpoena shall command each person to whom it is directed . . . to permit inspection of premises, at a **time and place therein specified**." FED. R. CIV. P. 45(a)(1)(C) (emphasis added). Rule 34's provisions regarding inspection requests impose a similar obligation by requiring that the requesting party describe with reasonable particularity the items to be inspected and "specify a reasonable time, place, and manner of making the inspection and performing the related acts." FED. R. CIV. P. 34(b). Plaintiff's subpoena is deficient under both Rules 34 and 45.

First, the subpoena does not specifically identify the *place* where the proposed inspection or sampling would occur. The Subject Property is comprised of 80 acres of land on which 30 poultry houses and at least 3 residences are situated. The only "location" identified in Plaintiff's subpoena is the legal description for the entire 80 acre tract. The sampling request attached as an exhibit to the subpoena suggests that the bulk of the inspection and sampling would occur on "waste applied fields." However, the subpoena fails to identify the location of such fields.

Furthermore, as explained above, if by use of the phrase "waste applied fields" Plaintiff means poultry litter application sites, then it appears that no site on the Subject Property actually fits the vague description provided by Plaintiff.

Second, the subpoena fails to provide any specificity with respect to the "*manner* of making the inspection and *performing the related acts*." FED. R. CIV. P. 34(b). While Plaintiff has generically described the type of samples they intend to collect (i.e. soil, groundwater, surface water and litter), they have refused to specify the "related acts" they intend to perform on these samples. For example, with respect to surface water run-off samples and the groundwater samples, Plaintiff have recently advised the Tyson that "[o]ur decision concerning how and what to test for and how to preserve the water for testing are our attorney work product and the decisions are therefore privileged." *See* Ex. 2, May 2, 2006 Correspondence from Mr. Bullock to Mr. McDaniel, p. 2.[7] Plaintiff has presented no justification for their apparent desire to secretly conduct testing of samples gathered under the auspices of the discovery provisions of the Federal Rules of Civil Procedure. Tyson needs to know what constituents the Plaintiff is testing for so that they can properly evaluate Plaintiff's proposed sampling collection and preservation methods and make arrangements to obtain and test proper field split samples in order to evaluate and perhaps discredit the results that Plaintiff's may report from their sampling campaign.[8]

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[7] With respect to soil and litter samples, Plaintiff provided for the first time on May 2nd a list of the constituents for their experts *initially recommended testing*. *See* Ex. 2, May 2, 2006 Correspondence from Mr. Bullock to Mr. McDaniel, p. 2. Tyson is still reviewing the "work plan" provided by Plaintiff as an attachment to this letter but notes for the Court that Plaintiff seeks to "reserve the right at any time to change, without notice to you [Tyson] what we test the samples for and the method or manner in which we handle our part of the sample[s]." *Id.*

[8] Plaintiff has refused to agree to provide Tyson with field split samples for testing and instead have demanded that Tyson accept composited samples prepared by Plaintiff's laboratory. (*See* Ex. 2, May 2, 2006, correspondence from Mr. Bullock to Mr. McDaniel.) Tyson believes that the standard sampling approach of gathering field split samples is necessary to ensure that Tyson can properly evaluate and potential refute the results to be reported by Plaintiff.

Plaintiff's subpoena and their continuing refusal to disclose information relating to the manner of the proposed sampling and the tests to be conducted on samples collected violate the specificity requirements of Rules 34 and 45.

Finally, and perhaps most significantly, Plaintiff's subpoena is defective because it does not identify with any degree of specificity the dates and times on which Plaintiff seeks to inspect or sample the Subject Property. Although the face of the subpoena indicates that the inspection would occur on "May 5, 2006 @ 9:00 a.m.," a review of the "sampling request" attached as an exhibit to the subpoena reveals that this is merely the date and time of the *first of many different sampling events* which Plaintiff seeks to compel pursuant to this subpoena. The sampling request attached states that rainfall runoff samples "will be conducted *from time to time through June 30, 2006 as rainfall events occur*." Plaintiff also apparently intends to repeatedly access the property in order to collect "grab samples" from groundwater monitoring wells they intend to construct on the Subject Property. Here again, no schedule for this access and collection is provided by Plaintiff's subpoena. Plaintiff, under the current subpoena, seeks the right to access the Subject Property at any time, as many times as it wishes, for a period of at least two months. Clearly, such access would impose a significant burden upon the property owner. Tyson, as the owner of the Subject Property has a right to notice that the Subject Property will be accessed and sampled *at a particular time*. *See* FED. R. CIV. P. 45(a)(1)(C) and 34(b). Plaintiff's subpoena fails to provide such notice.

The request for a continuing right to access the Subject Property at unspecified times presents practical problems which could create substantial prejudice to Tyson's ability to defend against the data Plaintiff's experts hope to collect in these sampling events. Tyson is entitled to have its experts and attorneys present to observe and properly documents these sampling events.

In the absence of properly scheduled sampling events, Tyson may be unable to mobilize their attorneys and experts to observe the periodic sampling undertaken by Plaintiff.

Because the subpoena does not specify the location, time, frequency, or manner of the sampling to be performed, it is defective under Rules 34 and 45. Consequently, this Court should quash the subpoena.

E. Alternatively, the Court Should Place Conditions Upon the Inspection and Sampling and Should Require Plaintiff to Post a Bond Sufficient to Indemnify Tyson.

In the event that this Court does not find reason to quash Plaintiff's subpoena, Tyson requests the entry of an order pursuant to FED. R. CIV. P. 45(c) establishing certain conditions for Plaintiff's inspection and sampling of the Subject Property. Specifically, Tyson request the entry of a protective order requiring Plaintiff and its lawyers and experts to strictly adhere to all of Tyson's biosecurity policies and measures described in Exhibits 2 and 3 *in addition to* those biosecurity policies proposed by Plaintiff pursuant to Mr. Bullock's May 2, 2006 letter. (See Ex. 2.) Furthermore, this Court should require, as a condition precedent to any inspection and sampling of the Subject Property, that Plaintiff post a bond in an amount sufficient to indemnify Tyson for any damages caused to the real property or to the poultry flocks in the course of inspection and sampling.

"Because a federal court has the inherent power to protect anyone from oppressive use of process, the court may require a plaintiff to demonstrate that he has made provisions for the costs of discovery prior to ordering the Clerk to issue subpoenas." *Gregg v. Clerk of United States District Court*, 160 F.R.D. 653, 654 (N.D. Fla. 1995) (citing *Badman v. Stark*, 139 F.R.D. 601, 604 (M.D. Penn. 1991)). In the context of invasive inspection or sampling of property, the Oklahoma federal courts have in past required the party requesting such discovery to post a bond sufficient to indemnify the property owner from any damages caused. In *Williams v. Continental*

Oil Co., the United States District Court for the Western District of Oklahoma imposed a bond requirement as a condition to a party's request to conduct a subsurface directional survey of another party's oil well. 14 F.R.D. 58 (W.D. Okla. 1953). There, the court stated:

> The cases uniformly agree that where a survey is ordered the complete risk and hazard, if any, must be borne by the plaintiff; the defendant cannot be submitted to possible loss. Without exception the plaintiff must post a bond sufficient to hold the defendant harmless.

Id. at 66. The importance of providing security for potential damage caused by proposed testing was also discussed by the court in *Micro Chemical v. Lextron, Inc.*. In that case, the court took into consideration in its denial of Micro Chemical's request to alter the piece of equipment to be tested the fact that "Micro Chemical has neither made nor offered any provision for security in the event of damage to the machine or other loss which may be suffered by Lextron if the alteration of the machine were ordered." *Micro Chemical*, 193 F.R.D. at 669.

Clearly, this Court has the power to ensure that Plaintiff takes responsibility for all damages that might be caused by its sampling. Thus, this Court should require Plaintiff to post a bond prior to the commencement of sampling in an amount sufficient to cover any foreseeable damages that may be inflicted upon Tyson's real property or upon its flocks as a result of the proposed inspection and sampling.

III. CONCLUSION

For the foregoing reasons, Separate Defendant Tyson Chicken, Inc. requests that this Court quash Plaintiff's subpoena. Alternatively, Tyson requests that the subpoena be modified by the Court to require that Plaintiff comply with proper biosecurity measures in carrying out their sampling and that Plaintiff be required to post a bond to indemnify Tyson from any damages that result from the sampling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants.

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and I further certify that a true and correct copy of the above and foregoing will be mailed via first class U.S. Mail, postage properly paid, on the following who are not registered participants of the ECF System:

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